

XAVIER BECERRA
 Attorney General of California
 SARAH E. MORRISON
 ERIC KATZ
 Supervising Deputy Attorneys General
 CATHERINE M. WIEMAN, SBN 222384
 TATIANA K. GAUR, SBN 246227
 ROXANNE J. CARTER, SBN 259441
 JESSICA BARCLAY-STROBEL, SBN 280361
 Deputy Attorneys General
 300 South Spring Street, Suite 1702
 Los Angeles, CA 90013
 Telephone: (213) 269-6329
 Fax: (916) 731-2128
 E-mail: Tatiana.Gaur@doj.ca.gov
*Attorneys for Plaintiff State of California, by and
 through Attorney General Xavier Becerra and
 California State Water Resources Control Board
 [Additional Parties and Counsel Listed on Signature
 Page]*

LETITIA JAMES
 Attorney General of the State of New
 York
 PHILIP BEIN
 Senior Counsel
 TIMOTHY HOFFMAN*
 Senior Counsel
 Office of the Attorney General
 Environmental Protection Bureau
 28 Liberty Street
 New York, NY 10005
 Telephone: (716) 853-8465
 Fax: (716) 853-8579
 Email: Timothy.Hoffman@ag.ny.gov
*Attorneys for Plaintiff State of New
 York*

IN THE UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA BY AND THROUGH
 ATTORNEY GENERAL XAVIER BECERRA AND
 CALIFORNIA STATE WATER RESOURCES
 CONTROL BOARD, STATE OF NEW YORK,
 STATE OF CONNECTICUT, STATE OF ILLINOIS,
 STATE OF MAINE, STATE OF MARYLAND,
 STATE OF MICHIGAN, STATE OF NEW JERSEY,
 STATE OF NEW MEXICO, STATE OF NORTH
 CAROLINA EX RE. ATTORNEY GENERAL
 JOSHUA H. STEIN, STATE OF OREGON, STATE
 OF RHODE ISLAND, STATE OF VERMONT,
 STATE OF WASHINGTON, STATE OF
 WISCONSIN, COMMONWEALTHS OF
 MASSACHUSETTS AND VIRGINIA, THE NORTH
 CAROLINA DEPARTMENT OF
 ENVIRONMENTAL QUALITY, THE DISTRICT OF
 COLUMBIA, AND THE CITY OF NEW YORK,

Plaintiffs,

v.

**DECLARATION OF KATHLEEN M.
 BASKIN**

**ANDREW R. WHEELER, AS ADMINISTRATOR
OF THE UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY; UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY; R.
D. JAMES, AS ASSISTANT SECRETARY OF THE
ARMY FOR CIVIL WORKS; AND UNITED
STATES ARMY CORPS OF ENGINEERS,**

Defendants.

DECLARATION OF KATHLEEN M. BASKIN

I, Kathleen M. Baskin, declare and state as follows:

1. I am the Assistant Commissioner for the Bureau of Water Resources at the Massachusetts Department of Environmental Protection, a position I have held since July 2019. I have over 35 years of experience studying and implementing improvements to wastewater discharges; stormwater management; wetlands protection; drinking water protection; and water quality of natural systems, including approximately 15 years dedicated to the cleanup of both Boston Harbor and the Charles River. I have worked in the private, not-for-profit, and public sectors, and was the Director of Water Policy for the Commonwealth of Massachusetts for 11 years. I submit this declaration in further support of the Commonwealth of Massachusetts' ("Commonwealth" or "Massachusetts") challenge to the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (jointly, "Agencies") final rule ("New Rule") promulgating a new definition of the Waters of the United States covered by the Clean Water Act (33 U.S.C. §§ 1251-1387).

2. I oversee and am responsible for the statewide implementation of the agency's water-related programs, all housed in the Bureau of Water Resources, including the Massachusetts Wetlands Protection Act; Section 401 of the Federal Clean Waters Act; the Wetlands Conservancy Mapping Program; MassDEP's Wastewater Programs, including Title 5 (septic systems), National Pollution Discharge Elimination System (NPDES) regulating surface water discharges, and the Groundwater Discharge Program. I am responsible for implementation of the Safe Drinking Water Act, Water Management Act, and the Drinking Water and Clean Water

1 State Revolving Funds. I also manage the Bureau's personnel and finances. I earned Bachelor of
2 Science degrees in Civil Engineering and Biology, and a Master of Science in Environmental
3 Engineering at Tufts University. I also hold a Master in Public Administration from the Harvard
4 Kennedy School of Government.

5 3. As explained below, the New Rule will irreparably harm Massachusetts and its
6 residents and those harms would be remedied by enjoining, and ultimately invalidating, the New
7 Rule. The New Rule will likely impair water quality in the Commonwealth; increase the
8 likelihood of flood damage; disrupt the Commonwealth's existing efforts to ensure clean water;
9 impose new regulatory costs and burdens; increase costs to downstream municipalities and
10 facilities that may become subject to more stringent discharge limitations; and create confusion
11 for regulatory bodies, project proponents, and the public.

12 **HARM DUE TO REDUCED WATER QUALITY AND INCREASED FLOOD RISKS**

13 4. The health and quality of Massachusetts' many navigable rivers, streams, lakes and
14 coastal waters is inextricably intertwined with the health and quality of upland and upstream
15 wetlands and waterways. The many waters that have a nexus with navigable waters—including
16 wetlands; standing water bodies like lakes and ponds; and flowing streams of all types, including
17 perennial, intermittent, and ephemeral streams—perform numerous critical functions. For
18 example, they maintain the quality of water for human consumption by filtering and trapping
19 contaminants and toxic substances; they protect fisheries habitats by moderating stream flow
20 temperatures; and they store and confine floodwaters that protect structures and people from the
21 harmful impacts of hurricanes and other major storm events, which, due to climate change, are
22 becoming more frequent and more severe.

23 5. By decreasing the scope of wetlands and waterways that are subject to the protections
24 of the federal Clean Water Act, the New Rule is likely to result in additional water pollution,
25 reduced water quality in both upstream waters and downstream navigable waters, degraded
26 habitat for fisheries, and increased flood risks within Massachusetts.

HARMS DUE TO OUT-OF-STATE ACTIVITY

6. A clear and strong federal baseline is critical to the protection of waters in Massachusetts because the Commonwealth cannot directly regulate or control out-of-state activities that affect waters flowing into Massachusetts. The Connecticut and Merrimack Rivers, for example, are interstate waters that flow through Vermont and New Hampshire, respectively, before entering Massachusetts. Numerous other waterways also enter Massachusetts after flowing through upstream States. *See* 314 C.M.R. § 4.06 (identifying the rivers basins in Massachusetts and mapping waterways, including the many waterways originating upstream, within each basin). The water quality of the navigable rivers within Massachusetts therefore depends on sufficient safeguards in upstream States.

7. The New Rule eliminates from the scope of federal protections certain critical waters in the States upstream of Massachusetts—including ephemeral headwater streams (which EPA estimates comprise 53%-59% of total stream miles in the country) and certain wetlands—that impact the health and integrity of Massachusetts’ water resources. The reduction in the Clean Water Act’s coverage is thus likely to result in increased upstream development activities, destruction of wetland resources that filter pollutants, and pollutant discharges that will have adverse impacts on waters within Massachusetts.

8. Reduced protections in upstream States, such as New Hampshire, also pose dangerous flood risks to Massachusetts. Headwater streams and non-floodplain wetlands are highly effective in storing stormwater. By eliminating some of those water bodies in upstream States from federal protection, more of these important areas will likely be destroyed or filled, thus increasing flood-associated risks to public and private property and to water quality within the Commonwealth.

9. The New Rule also newly eliminates from federal protections many ponds that cross state lines. For example, MassDEP has identified a pond that straddles Egremont, Massachusetts and Copake, New York near Catamount Ski Area, and a water body that straddles Webster, Massachusetts and East Thompson, Connecticut just Northeast of Long Pond (in Connecticut) as interstate bodies of water that had previously been covered by the Act, but may not be covered by

1 the New Rule. These are thus examples of waters whose health is both directly affected by
2 activity in other jurisdictions, and likely to be undermined by the New Rule.

3 HARMS DUE TO IN-STATE ACTIVITY

4 10. Diminishing the scope of waters subject to the federal Clean Water Act will also
5 undermine water quality and integrity because it will affect certain in-state filling and discharge
6 activities. Although Massachusetts' jurisdiction over wetlands and waterways in the
7 Commonwealth is broad, and although Massachusetts' state laws are broadly protective of those
8 waters, Massachusetts laws and regulations are not coextensive with federal protections and
9 regulatory tools. The loss of protections under the Clean Water Act will thus create regulatory
10 gaps in Massachusetts to the detriment of the integrity and quality of its waters.

11 11. Control of stormwater discharges presents such a regulatory gap that will result from
12 the New Rule. Massachusetts law does not require stormwater controls in upland areas for
13 existing projects, absent a showing that the construction will alter a defined resource area. The
14 federal Clean Water Act, by contrast, does impose stormwater controls in upland areas wherever
15 construction activity will disturb more than 1 acre and stormwater will discharge to a water of the
16 United States. *See* 40 C.F.R. 122.26(b)(14)(x), (b)(15). By reducing the scope of waters that
17 would otherwise require federal stormwater controls, certain activities affecting water quality in
18 Massachusetts that had been regulated under federal law will no longer be regulated. This is a
19 critical gap because stormwater is the leading cause of water quality impairment in
20 Massachusetts. Sediments such as sands, clays, and silts are the most common pollutants in
21 stormwater runoff by volume and weight, and construction site erosion due to stormwater
22 discharges is among the most significant sources of sediments in Massachusetts waterways and
23 wetlands. Moreover, stormwater discharges also transport significant amounts of other damaging
24 pollutants into waterways and wetlands in Massachusetts, such as pathogens and nutrients, which
25 adversely affect water quality and ecosystem and public health.

26 12. The New Rule also will affect protections for vernal pools in Massachusetts—pools
27 that typically fill with water in autumn or winter and remain ponded into the summer. Such pools
28 provide essential habitat, including for critical breeding functions, for a variety of amphibians and

1 other wildlife species, including species protected under federal and state rare and endangered
2 species laws. There are 7,615 vernal pools in Massachusetts that have been certified as
3 “Outstanding Resource Waters” because they contain certain ecologically important animal
4 species, and there are likely many other such pools that have not been certified but that may
5 potentially meet the same qualifying criteria.¹

6 13. Under state law, the Massachusetts Wetlands Protection Act applies only to those
7 vernal pools that are located within a state defined wetland resource area. Nonetheless, the
8 Commonwealth’s Section 401 Water Quality Certification regulations have historically afforded
9 protections to many other vernal pools because they have fallen within the jurisdiction of the
10 federal Clean Water Act (as determined by the Army Corps of Engineers pursuant to the Section
11 404 permitting program). Because of the New Rule’s narrower definition of waters covered by
12 the Act, many vernal pools that are not located in defined wetland resource areas will lose such
13 protections. In other words, even though these pools have a significant nexus with the health of
14 downstream waters and serve critical ecological functions, MassDEP’s Section 401 Water
15 Quality Certification authority will no longer allow the agency to protect this important water
16 resource from harmful dredging and filling activities due to the narrower scope of jurisdiction
17 under the New Rule.

18 14. Certain other activities that are covered by federal permits are not covered by state
19 permits. For example, under the Massachusetts Wetlands Protection Act, filling or dredging
20 activities undertaken for the purpose of replacing a public utility structure do not require a permit.
21 Where that type of activity is conducted in wetlands that had been deemed jurisdictional under
22 federal law, but are no longer within federal jurisdiction under the New Rule—a class that will
23 include many critical wetlands that do not directly abut jurisdictional tributaries—such activity
24 will lie outside of any permitting requirement. Similarly, state bridge projects are exempt from
25 the Massachusetts Wetlands Protection Act. When such projects are undertaken in areas no longer
26 subject to federal jurisdiction under the New Rule, protections previously afforded to waters and

27 _____
28 ¹ See MassGIS Data: NHESP Potential Vernal Pools (Dec. 2000),
<https://docs.digital.mass.gov/dataset/massgis-data-nhesp-potential-vernal-pools>.

1 wetlands within Massachusetts under Sections 401 and 404 will no longer attach, thus resulting in
2 degradation of wildlife habitat, increased flood risks to people and property, and decreases in
3 downstream water quality caused by the destruction of upstream wetlands that would otherwise
4 have stored floodwaters and filtered out the pollutants.

5 **HARMS TO REGULATORS AND THE REGULATED COMMUNITY**

6 15. Along with reductions in water quality, the New Rule will impair the
7 Commonwealth's efforts to improve and protect in-state waters; impose costs and new regulatory
8 burdens on the Commonwealth; further burden those in-state entities that are already subject to
9 stringent regulatory limitations; and result in widespread confusion about the scope of waters
10 subject to federal protections.

11 INTERFERENCE WITH EFFORTS TO ENHANCE WATER QUALITY

12 16. The Commonwealth engages in various activities to continuously assess and improve
13 water quality within Massachusetts, many of which are mandated by the Clean Water Act. For
14 example, under Section 305(b) of the Act, the Commonwealth evaluates waters to determine their
15 capacity to support "designated uses," such as aquatic life support, fish and shellfish
16 consumption, drinking water supply, and recreation. And under Section 303(d) of the Clean
17 Water Act, the Commonwealth identifies waters that are not expected to meet state water quality
18 standards and will require additional regulation, such as the development of total maximum daily
19 loads (TMDLs) to control pollution or the imposition of new limitations on effluent discharges.
20 The impacts of the New Rule will disrupt the Commonwealth's progress under these frameworks
21 in protecting and enhancing water quality in Massachusetts. Rather than focus on obtaining
22 further progress, the Commonwealth may be forced to divert its resources to address water bodies
23 that have become newly impaired due to increased pollution levels from the loss of federal
24 protections, including due to pollution from out-of-state waterways that flow into Massachusetts.
25 For example, the Commonwealth may have to revise existing TMDLs or prepare new TMDLs in
26 areas where water quality has deteriorated as a result of the New Rule. And this will be a costly
27
28

1 task: in a draft report issued by EPA in 2001, the agency estimated the average cost of developing
2 TMDLs to be about \$52,000, with a range of costs between \$26,000 to over \$500,000.²

3 17. Imposing new or revised TMDLs would, in turn, adversely impact many entities in
4 Massachusetts, such as municipal sewage treatment plants and industrial facilities that have
5 permits to discharge directly into navigable-in-fact waters. Those entities may be forced to further
6 limit their own discharges, facing additional costly effluent limitations. To the extent such entities
7 are commercial actors, the costs of such measures would place them at a competitive
8 disadvantage, as they would have to compete with out-of-state entities that do not have to bear
9 such costs and that may, because of the effect of the New Rule, actually face reduced compliance
10 costs.

11 NEW COSTS AND BURDENS TO COMMONWEALTH AS REGULATOR

12 18. In its capacity as regulator, the Commonwealth will face unique costs and burdens.
13 First, Massachusetts is one of three States (along with New Hampshire and New Mexico) that
14 does not have authorization from EPA to administer the National Pollution Discharge Elimination
15 System (NPDES) permitting program. In other words, the federal government, as a general
16 matter, remains responsible for permit issuance, compliance, and enforcement for the nearly
17 3,000 NPDES permit holders in Massachusetts.

18 19. The New Rule threatens to disrupt a number of MassDEP's staffing and resource
19 decisions, which have been made in reliance on both the federal government's administration of
20 the NPDES program in Massachusetts and the scope of activities that have been covered by
21 federal law. Under the New Rule, in circumstances involving discharges into a waterbody that is
22 covered by state law protections but that has newly lost federal Clean Water Act coverage,
23 MassDEP would have to work on its own to issue permits for any surface water discharges. While
24 MassDEP has such authority, exercising that authority would impose new costs and burdens on
25 an agency that has been staffed more leanly as a non-delegated program. MassDEP would face
26 particular difficulties regulating discharges (into waters newly deemed to be outside of the federal

27 ² See EPA, The National Costs of the Total Maximum Daily Load Program 18 (Aug.
28 2001), <https://nepis.epa.gov/Exe/ZyPDF.cgi/901K0800.PDF?Dockey=901K0800.PDF>. When
adjusted for inflation, these costs range from \$38,000 to more than \$730,000 per TMDL.

1 Act) that are covered under general permits, as MassDEP would either have to develop an
2 entirely new, separate general permit, or issue numerous individual permits to facilities that
3 normally would be covered under a general permit.

4 20. In addition to disrupting the NPDES permit process under Section 402 of the Act, the
5 New Rule will also disrupt the administration of Section 404 permits for dredge and fill activities.
6 The Commonwealth has undertaken significant work over the years to streamline the processes
7 for projects triggering multiple federal and state permits, and to eliminate duplicative
8 Massachusetts requirements for projects that require Section 404 permits, as well as the Section
9 401 Water Quality Certifications that apply to areas covered by such Section 404 permits.
10 Reducing the scope of jurisdiction for Section 404 permits is a direct by-product of the New Rule
11 since the definition of regulated “water of the United States” under the Clean Water Act applies
12 to all of the federal Act’s permitting programs. This will eliminate the alignment between state
13 and federal requirements in these areas and would likely impose further regulatory costs and
14 burdens on the Commonwealth to fill the gaps created by the New Rule.

15 21. The New Rule will also disrupt MassDEP’s administration of the state Wetlands
16 Protection Act. In particular, MassDEP will have to grapple with significant uncertainties about
17 the jurisdictional status of different wetlands and will have to identify, and adequately respond to,
18 activities and projects that may no longer be subject to federal permitting requirements.

19 22. Taken together, these various disruptions would result in considerable new costs and
20 burdens across multiple programs at MassDEP. For example, assessing the impacts of the New
21 Rule for implementing the TMDL, NPDES, Section 401 Water Quality Certification, and
22 wetlands programs would require extensive technical analyses—including hydraulic, hydrologic,
23 and water quality analyses, GIS interpretation and analyses, and field verification work—as well
24 as regulatory research and development, including additional coordination with EPA since
25 Massachusetts is one of the states that does not have authorization to administer the NPDES
26 Program. The costs of the associated workload are difficult to estimate but would, at a minimum,
27 entail additional staffing needs in the form of multiple Full Time Equivalents (FTEs), as well as
28 expenses for contracted services to develop a data management system—which would be

1 necessary to manage data associated with issuing state permits to waters no longer subject to
2 federal protections. The Department estimates that hiring outside consultants to build such a data
3 management system would require a considerable amount of funds.

4 LIKELIHOOD OF CONFUSION AND UNCERTAINTY

5 23. The Commonwealth's efforts to take the necessary steps to protect water quality and
6 to maintain adequate protections due to reduced federal jurisdiction will be especially difficult in
7 light of the New Rule's vague and ambiguous definitions, which will cause widespread
8 confusion—to regulators, the public, and regulated entities—about the scope of waters covered
9 by the federal Act. For example, confusion will arise under the New Rule's requirement that a
10 river or stream be "naturally occurring" to qualify as a "tributary" covered by the Clean Water
11 Act. Although the New Rule states that a covered "tributary" does not lose its status through
12 "alteration or relocation," in practice it may be extremely difficult to determine whether certain
13 streams that currently flow in artificial channels were once "naturally occurring" (and thus subject
14 to federal jurisdiction) or whether they had only ever been artificial (and thus outside of federal
15 jurisdiction). Evidence of changes occurring decades or centuries ago may be difficult to locate (if
16 such evidence exists at all today), yet a great many bodies of water in Massachusetts were altered
17 or relocated centuries ago. For example, in the 18th and 19th centuries, manufacturing facilities
18 associated with Massachusetts' historic textile industry and gristmills often altered the flow of
19 streams and rivers to provide power to their facilities and create impoundments for fire protection.
20 *E.g.* 1875 Mass. Laws ch. 74.

21 24. Another avenue of confusion will be distinguishing between intermittent streams that
22 flow continuously during certain times of the year (which—along with perennially flowing
23 streams that flow continuously year-round—are covered by the New Rule) and ephemeral
24 streams that flow only in response to precipitation (which are not covered). Data from the federal
25 National Hydrography Dataset indicates that approximately 31,188 stream segments—
26 approximately 14% of all mapped stream segments—are not perennial (and are thus either
27
28

intermittent or ephemeral) in Massachusetts.³ But that federal dataset identifies very few ephemeral streams and so it is likely that the distinction between intermittent and ephemeral streams will turn in part on field delineations, and the burden of that task will fall on MassDEP as well as federal officials. Accordingly, by excluding ephemeral streams from federal jurisdiction, the New Rule will spur confusion for regulatory bodies, project proponents, and the public about, for example, which projects require a MassDEP issued Water Quality Certification pursuant to Section 401 of the federal Clean Water Act. And clearing up that confusion will require expending resources on field delineations that MassDEP would not otherwise have to incur.

25. The New Rule also uses vague terminology in excluding from federal Clean Water Act jurisdiction any river or stream that is not perennial or intermittent in a “typical year,” as well as any river, stream, pond, lake, or impoundment that does not contribute surface flow to jurisdictional waters in a “typical year.” Requiring assessment of precipitation and flow in a “typical year” is inconsistent with the tools the Commonwealth relies on to assess water bodies. Rather than rely on precipitation averages over long periods of time, as the New Rule requires—and despite the fact that doing so will obscure the impact that higher precipitation associated with climate change has, and will continue to have, on these waterbodies—the Commonwealth has long depended on data from USGS stream gauge network to determine actual stream flow, estimate flow parameters at streams that are not gauged, and account for streams’ geomorphological characteristics. Indeed, the USGS StreamStats is the best tool available, barring a detailed hydrologic/hydraulic analysis, to assess whether a stream is perennial or intermittent (rather than ephemeral) and flows into other jurisdictional waters. Mandating a different framework to ascertain whether certain waters are subject to federal law will result in added costs and increased confusion.

* * *

26. In sum, based on MassDEP’s analysis of the New Rule, its likely adverse impacts on waters in the Commonwealth, and the challenges that the agency will likely face in terms of


³ According to EPA, “[a]lmost 60% of all stream miles in the continental U.S. only flow seasonally or after storms.” EPA, Web Archive: Streams, <https://archive.epa.gov/water/archive/web/html/streams.html>.

1 additional burdens and disruptions to our regulatory framework, the New Rule will cause
2 substantial and irreparable harm to the Commonwealth.

3 * * *

4 27. I have read the above statement consisting of 12 pages, and I certify under the penalty
5 of perjury that the foregoing is true and correct.

6
7 Executed on the 15th day of May in Boston, Massachusetts.

8
9 
10 Kathleen M. Baskin